Gan Thing Phing v Ong Gek Kim (No 2)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–105 OF 1997
KAMALANATHAN RATNAM J
29 SEPTEMBER 1998

Civil Procedure *— Affidavits — Defective affidavit — Main affidavit in support of application does not have title to the action — Whether affidavit must be rejected — Rules of the High Court 1980 O 41 r 2*

Civil Procedure *— Affidavits — Defective affidavit — Affidavits filed show they were neither sworn nor affirmed but merely signed — Whether affidavits must be rejected*

Civil Procedure *— Affidavits — Defective affidavit without jurat — Whether affidavit must disregarded in the absence of jurat*

Civil Procedure *— Estoppel — Issue estoppel — Whether plaintiff's own conduct nuetralized his plea of estoppel*

Civil Procedure *— Irregularity — Affidavit — Application for extension of private caveat — Failure to include jurat and to affirm before a commissioner of oath — Whether defects can be termed as irregular*

The plaintiff applied for an extension of the private caveat pursuant to s 326 of the National Land Code 1965. In support of his application, the plaintiff filed three affidavits. In her reply, the defendant raised objections to the three affidavits and contended that they were defective in that: (i) the affidavits were not properly intituled; (ii) there was not jurat; and (iii) they were not affirmed before the commissioner. After the court had given directions for written submissions, the defendant submitted that not only had the plaintiff filed the written submission, he also filed three fresh affidavits in a purported attempt to rectify the errors in the affidavits filed earlier. It was contended that the plaintiff ought to have obtained leave of the court before filing these three fresh affidavits. The defendant argued that an application for leave after directions for written submissions had been given was not a requirement pursuant to the Rules of the High Court 1980 ('the RHC'). The plaintiff also pointed out that the defendant had applied to strike out this application and since in that application the defendant had failed to raise these same issues in respect of the affidavits, she was now estopped from doing so.

Held, dismissing the application:

(1) Order 41 r 1(1) of the RHC provides that every affidavit sworn in a case or matter must be entitled in that cause or matter. In this case, the affidavit in support of the application did not comply with the very first rule relating to the filing of affidavits since it did

not have the title to the action. On this ground alone, the affidavit must be rejected and since the application was thus unsupported, it ought to have been dismissed (see pp 355I–356A).

(2) The affidavit was in Bahasa Malaysia, whereas the plaintiff had signed in the Chinese language. The court was not satisfied that the plaintiff understood the contents of his affidavit. The jurat did not state that the plaintiff had been translated the contents of his affidavit. Besides, it was not known whether the commissioner of oath himself understood the Chinese language. On this absence of the jurat, the affidavits ought to have been disregarded and consequently the application ought to have failed (see p 356C–G).

(3) An affidavit must either be sworn or affirmed. The affidavits earlier filed showed that they were neither sworn nor affirmed, but they were merely signed. There was not a trace, in the word 'ditandatangani' as used in the present case, of any semblance of affirmation or swearing (see p 356H–I).

(4) All affidavits filed subsequently with the intention of rectifying the defects existing in the earlier affidavits must be rejected as having been filed without the leave of the court (see p 357D).

(5) The plaintiff ought to have raised estoppel in his affidavit in reply and ought not to have rushed to refile the three affidavits rectifying the earlier errors. By his own conduct, the plaintiff had neutralized his plea of estoppel; therefore, when the defendant raises the issues afresh, the court will have to consider them afresh (see p 357G).

[Bahasa Malaysia summary

Plaintif memohon perlanjutan kaveat persendirian menurut s 326 Kanun Tanah Negara 1965. Bagi menyokong permohonannya, plaintif memfailkan tiga afidavit. Dalam jawapannya, defendan membangkitkan bantahan terhadap ketiga-tiga afidavit tersebut dan berhujah bahawa mereka adalah tidak sempurna dalam ertikata: (i) afidavit-afidavit tersebut tidak membawa judul yang betul; (ii) tidak terdapat jurat; dan (iii) mereka telah tidak diikrarkan di hadapan pesuruhjaya. Selepas mahkamah memberikan arahan untuk penghujahan bertulis, defendan berhujah bahawa plaintif bukan sahaja memfailkan penghujahan bertulis, ia juga telah memfailkan tiga afidavit baru dalam percubaan untuk membetulkan kesilapan dalam afidavit yang difailkan lebih awal. Adalah dihujahkan bahawa plaintif sepatutnya mendapatkan kebenaran daripada mahkamah sebelum memfailkan tiga afidavit baru tersebut. Defendan berhujah bahawa suatu permohonan untuk kebenaran selepas arahan untuk penghujahan bertulis telah diberikan bukanlah suatu keperluan menurut Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif juga menegaskan bahawa defendan telah memohon supaya

A permohonan tersebut dibatalkan dan oleh kerana dalam permohonan tersebut defendan telah gagal membangkitkan isu-isu ini berkaitan dengan afidavit-afidavit tersebut, ia kini diestop daripada berbuat demikian.

B **Diputuskan**, menolak permohonan:

(1) Aturan 41 k 1(1) KMT memperuntukkan bahawa setiap afidavit yang diikrarkan dalam suatu kes atau perkara mestilah berjudul dalam kausa atau hal tersebut. Dalam kes ini, afidavit yang menyokong permohonan tidak mematuhi kaedah pertama mengenai pemfailan afidavit kerana ia tidak memaparkan judul C tindakan tersebut. Atas alasan ini sahaja, afidavit tersebut mesti ditolak dan memandangkan permohonan tersebut tidak disokong, ia sepatutnya ditolak (lihat ms 355I–356A).

(2) Afidavit tersebut adalah dalam Bahasa Melayu, manakala plaintif telah menandatangani dalam Bahasa Cina. Mahkamah tidak puas D hati bahawa plaintif telah memahami kandungan afidavitnya. Jurat tidak menyatakan bahawa plaintif telah diberitahu tentang penterjemahan kandungan afidavitnya. Di samping itu juga, ia tidak diketahui sama ada pesuruhjaya sumpah sendiri memahami Bahasa Cina. Atas ketiadaan jurat, afidavit-afidavit tersebut sepatutnya tidak diambilkira dan dengan itu permohonan tidak E harus dibenarkan (lihat ms 356C–G).

(3) Suatu afidavit mestilah disumpah atau diikrarkan. Afidavit-afidavit yang difailkan terlebih dahulu menunjukkan bahawa mereka tidak disumpah atau diikrarkan, tetapi cuma ditandatangani. Tidak diperlihatkan, dalam perkataan 'ditandatangani' seperti yang F digunakan dalam kes ini, sebarang kesan pengesahan atau pengangkatan sumpah (lihat ms 356H–I).

(4) Semua afidavit yang difailkan berikutnya dengan tujuan membetulkan ketidaksempurnaan yang kelihatan dalam afidavit yang lebih awal mestilah ditolak disebabkan ia difailkan tanpa kebenaran daripada mahkamah (lihat ms 357D).

G (5) Plaintif sepatutnya telah membangkitkan estopel dalam afidavit jawapannya dan tidak sepatutnya memfailkan semula tiga afidavit yang membetulkan kesilapan yang lebih awal secara tergesa-gesa. Melalui kelakuannya sendiri, plaintif telah meneutralkan hujah estopelnya; maka apabila defendan membangkitkan isu-isu H tersebut sekali lagi, mahkamah haruslah menimbangkannya semula (lihat ms 357G).]

Notes

I For cases on defective affidavit, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 249–251.

For a case on defective affidavit without jurat, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 254.

For cases on issue estoppel, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1683–1685.

For cases on irregular affidavit, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2441–2442.

Case referred to

Voon Mow Chen v Menteri Dalam Negeri & Anor [1993] 2 AMR 38 (refd)

Legislation referred to

National Land Code 1965 s 326

Rules of the High Court 1980 O 41 rr 1(1), 4, 7, 8, O 92 r 4

Charles Hector (*Wee Choo Keong & Faaiz*) for the plaintiff.

T Gunaseelan (*Gunaseelan & Associates*) for the defendant.

Kamalanathan Ratnam J: The plaintiff won the first prize of RM2m in the Pan Malaysian Big Sweep Sdn Bhd. He sought the assistance of his brother, Gan Chin Hock, to collect the said prize money and to deposit a sum of RM1.5m in the name of his daughter, Gan Chye Thing, and for the remaining RM500,000 to be distributed in equal shares amongst his brothers and sisters. The plaintiff now contends that his brother has cheated him of the said sum and that having withdrawn the said sum, his brother has absconded with the RM2m. He sued his brother and has obtained an in default judgment against him.

Case for the plaintiff

The plaintiff contends that the defendant, who is his brother's wife, and his brother have utilized part of that money to pay for the purchase of a piece of land held under Geran No HS (D) 10825, PT Lot No 249, Mukim Ampang, Daerah Kuala Lumpur, with a four storey shop house therein and wherein a restaurant known as 'Ruong Thai Restaurant' was carrying on business, with the defendant as the sole proprietor. The plaintiff entered a private caveat (No Pers 4202/96) on the said land on 6 May 1996. The plaintiff has also obtained an order from this court on 3 March 1997, for the extension of the said caveat until the hearing and disposal of this originating summons. The plaintiff had served the draft order on the Registrar on 3 March 1997, but the said caveat was removed at about 9.45 am on 3 March 1997. However, on 18 April 1998, the plaintiff obtained an order from this court which in essence was an order that the removal or cancellation of the private caveat No Pers 4202/96 by the Land Administrator on 3 March 1997, be expunged from the Land Register and that the said caveat be reinstated in the said Land Registry until this originating summons and Civil Suit No S4–22–04–95 be heard. The defendant has appealed against that decision of mine.

The application

This originating summons prayed, inter alia, for the following orders, namely:

(a) that the said caveat No Pers 4202/96 be not set aside until the hearing of this action; and

(b) that the said caveat be not set aside until the disposal of an action which the plaintiff would be filing against this defendant.

In effect, this application is primarily for the extension of the private caveat pursuant to s 326 of the National Land Code 1965 ('the NLC').

Defendant's contention

In support of his application, the plaintiff filed an affidavit encl 2 and two other affidavits. In her reply, the defendant raised objections to the said three affidavits and contended that they were defective in that:

(1) the affidavits were not properly intituled;

(2) that there was no jurat; and

(3) that they were not affirmed before the commissioner.

After I had given directions for written submissions with the consent of parties, the defendant submitted that not only did the plaintiff file the written submission but also filed three fresh affidavits in a purported attempt to rectify the errors as pointed out by the defendant in respect of the plaintiff's three affidavits filed earlier. The contents of the latest three affidavits were identical to that of the earlier three filed. The defendant now takes the stand that the plaintiff ought to have obtained leave of the court before filing these three fresh affidavits.

The plaintiff's contention

The plaintiff argued that he had acted bona fide and with no intention of abusing the process of the court. He argued that an application for leave after directions for written submissions had been given, was not a requirement pursuant to the Rules of the High Court 1980 ('the RHC'). In any event, he argued that, if the defendant had wanted to file a reply, she could well have done so, but instead, having chosen not to do so, she cannot now complain.

Court's findings

Before I proceed to consider the law relating to this case, I have to consider the issues raised by the defendant in relation to the affidavits filed.

Non intitulement of the affidavits

Order 41 r 1(1) of the RHC provides that every affidavit sworn in a case or matter must be entitled in that cause or matter. It is obvious on perusal that

encl 2, which is the main affidavit in support of this application, does not comply with the very first rule relating to the filing of affidavits since it does not have the title to the action. On this alone the affidavit must be rejected and since the application is thus unsupported, it ought to have been dismissed.

A

B

No jurat

The rules relating to the jurat are O 41 r 1(7) and (8). They read as follows:

> (7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.
>
> (8) A jurat must be in one of the forms in Form 78.

C

On a perusal of the affidavits earlier filed, I note that the affidavit is in Bahasa, whereas the plaintiff has signed in the Chinese language. I am not satisfied that the plaintiff understood the contents of his affidavit. It is precisely for such cases that the rules had specifically provided for four different variations of jurat under Form 78, namely, 78(a)–(d). Paragraph (d) reads:

D

> To an affidavit by a person who does not understand English. Sworn (or affirmed) on the ..... day of ....., 19 ..... at ..... through the interpretation of ..... (if the interpreter is not a Court Interpreter add the following:
>
> > the said ..... having been first sworn that he had truly, distinctly, and audible translated the contents of his affidavit to the deponent ..... and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said .....)
>
> Before me
>
> .....
> Commissioner for Oaths

E

F

In this case the word 'English' should read 'Bahasa Melayu'. The jurat does not state that the plaintiff has been translated the contents of his affidavit. Besides, the commissioner of oaths is one Edwin D'Cruz. I do not know if he himself understood the Chinese language. On this absence of the jurat too, the affidavits ought to have been disregarded and consequently the application ought to have failed.

G

No affirmation but signing

The affidavits earlier filed show that they were neither sworn nor affirmed; but they were merely signed (ditandatangani oleh). It is trite law that an affidavit must either be sworn or affirmed. In *Voon Mow Chen v Menteri Dalam Negeri & Anor* [1993] 2 AMR 38, Vincent Ng JC (as he then was) held that even the use of the word 'diakui' or 'diperakui' was not permissible in the jurat of an affidavit and thus he held the said affidavit as defective. In the present case, the word used is 'ditandatangani'. There is not a trace in this word of any semblance of affirmation or swearing. On this issue too, the affidavits ought to have been rejected and the application ought to have failed.

H

I

Refiling of the affidavits

The plaintiff admits in his submission that in order to remedy these defects, he refiled the said affidavits again on 11 August 1998, and served them with his submission. The plaintiff relied on O 41 r 4 of the RHC. It reads:

> An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

It is obvious that the plaintiff can obtain the leave of the court if he intended to use an affidavit irregular in form. To my mind, the last two defects shown in these affidavits cannot be termed as irregular. These defects affect the very root of the affidavit. They are neither sworn nor affirmed nor do they show, by way of the jurat, if the contents were understood by the plaintiff. These defects are material defects and are not mere irregularities. Therefore, O 41 r 4 of the RHC will not apply to the last two defects at least.

The plaintiff could have, however, applied to this court for leave pursuant to O 92 r 4 of the RHC, which gives the court the inherent power to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. If such an application had been made even on the day directions for submissions were given, this court would have entertained such an application. Instead, the plaintiff chose to act on his own. I therefore hold that all affidavits filed subsequently with the intention of rectifying the defects existing in the earlier affidavits, must be rejected as having been filed without the leave of this court.

Waiver

The plaintiff also pointed out that the defendant had applied to strike out this application and that I had given a judgment on 18 April 1998, dismissing the defendant's application against which the defendant had since filed an appeal to the Court of Appeal. The plaintiff also argued that since in that application the defendant had failed to raise these same issues in respect of the affidavits, she was now estopped from doing so. This argument seemed attractive and I would have given credence to it if the plaintiff had not by his own conduct denied himself of the plea of estoppel. The plaintiff ought to have raised estoppel in his affidavit in reply and ought not to have rushed in panic to have refiled the three affidavits rectifying the earlier errors. By his own conduct, the plaintiff had neutralized his plea of estoppel; so when the defendant raises the issues afresh, I will have to consider them afresh.

Another issue raised by the defence and which I have to consider, is the fact that the plaintiff had also filed another suit in this court, No S2–22–88–97, which I had struck out on 23 July 1998. The said suit, which was for the refund of the RM2m, with interest, was in fact commenced after this originating summons had been filed. The issues and parties were the same except that the daughter of the plaintiff was the additional plaintiff. There was no appeal filed against the order of dismissal. However, the plaintiff had stated in the present affidavits that he has since filed a fresh suit. To my mind, the plaintiff, therefore, is not bereft of the remedy he is seeking by

way of this originating summons. But this application must fail on the preliminary issue itself.

The plaintiff argued that the defendant ought to have given notice and should only argue on this issue rather than submitting on this, as well as the entire issue. It is my judgment that there is no valid ground for the plaintiff to cry foul. The defendant has raised all these issues in her affidavit. Yet the plaintiff proceeded on. The defendant is therefore entitled to take all issues at the full hearing of the originating summons.

In any case I have not considered the merits. This application stands dismissed with costs.

Application dismissed.

Reported by Jafisah Jaafar